Supreme Court, U.S.
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No. 96-167

In The

Supreme Court of the United States

October Term, 1996

CITY OF CHICAGO,

Petitioner,

v.

SYLVIA EVANS,

Respondent.

CITY OF CHICAGO,

Petitioner,

v.

BERTHA BALARK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT, SYLVIA EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There are four separate opinions of the Court of Appeals in *Evans v. City of Chicago.* They are reported at 689 F.2d 1286 (7th Cir. 1982) (EVANS I); 873 F.2d 1007 (7th Cir. 1989) (EVANS II), 995 F.2d 1393 (7th Cir. 1993) (*reh'g en banc granted and vacated*) (EVANS III); and 10 F.3d 474 (7th Cir. 1993) (EVANS IV).

For this appeal, the critical junction is EVANS II. EVANS I dealt with a trial court finding that there had been both equal protection and due process violations and entry of a partial Summary Judgment in favor of the plaintiff class representatives, leaving open the question of damages. EVANS I affirmed the equal protection issue, found it unnecessary to reach the due process issue, and remanded the due process issue to the trial court for further proceedings. Thereafter, a consent decree was entered into on May 31, 1984. The decree remained in force until EVANS III held that it was appropriate to vacate the decree because of the decision in EVANS II. After the entry of the consent decree there was then a trial on damages. In the trial the plaintiffs introduced evidence and asked the trial court to confirm the due process issue, which it did, expressly finding that there was a due process violation. The trial court entered a judgment with findings of fact and conclusions of law and allowing damages to the plaintiff class members. Prior to trial the parties had entered into a stipulation containing a formula for payment of damages. The formula was keyed to a computer database which had been established, and depended upon what findings the trial court made with respect to a starting point for calculating interest, and other findings. When the City appealed from

this judgment, EVANS II held that the additional evidence at trial invoked an exception to the "law of the case" doctrine and thus had reopened the equal protection issue, and reversed the EVANS I holding on that issue. With respect to the due process issue, the EVANS II court noted in a footnote that this issue "has not survived to this stage of the litigation." (FN 15 at 873 F.2d 1018) On this point, never briefed and never argued, the apparent theory, although unarticulated in EVANS II, was that plaintiffs should have argued the due process issue in their Briefs, even though the trial court had ruled in their favor on it. So the due process issue died and was laid to rest in an unmarked grave.

There is no question but that after the decision in EVANS I the due process issue, unresolved at the time, originally was a basis for the settlement embodied in the consent decree. EVANS II removed the due process issue from further consideration in this litigation on the basis that plaintiffs had mistakenly waived the issue by failing to raise it on appeal. For that reason, it arguably was appropriate to hold in EVANS III that without any existing constitutional violation to support the consent decree, the contractual aspect of the decree was insufficient to support its continued existence, and therefore it was appropriate to vacate the decree.

ARGUMENT: WHY THE PETITION SHOULD NOT BE GRANTED

There are five recent Supreme Court decisions involving attorney fee awards under the Federal Civil

Rights Act: *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988); *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); *Shalala v. Schaefer*, 509 U.S. 292, 113 S.Ct. 2625, 125 L.Ed.2d 239 (1993).

EVANS IV is but one of a string of decisions in the lower federal courts which have interpreted these five Supreme Court decisions in a generally uniform manner. *Wilder v. Bernstein*, 965 F.2d 1196 (2d Cir. 1992) involved a settlement which was modified as a result of the efforts of certain intervenors. The district court had found that a "material alteration in the legal relationships of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected." (725 F.Supp. at 1332). In its decision the Second Circuit observed: (at 965 F.2d 1202)

> The fact that a claim has been resolved by settlement, as in this case, does not preclude a finding that intervenors are prevailing parties; it is plain that a party may prevail when it vindicates rights-regardless of whether there is a formal judgment-through a settlement of consent judgment. *See, e.g., Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 2675-76, 96 L.Ed.2d 654 (1987); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2577, 65 L.Ed.2d 653 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, reprinted in 1976 U.S. Code Cong. & Admin.News at 5912.

In *Koster v. Perales,* 903 F.2d 131 (2d Cir. 1990) plaintiffs who obtained a settlement agreement affecting emergency housing were held entitled to fees. And in *Heldman v. Sobol,* 846 F.Supp. 285 (SDNY 1994) judgment in favor of a parent for attorney's fees was approved although the parent's suit was not the "primary trigger" for a change in the law, but had a definite effect in producing "a resolution of the dispute which changes the legal relationship" and the court further stated: (at 846 F.Supp. 288):

> The portion of a party's fees which may be recovered from the adversary must be calibrated to reflect the importance of the party's contribution to the ultimate result, and the aspects of the litigation effort which made that contribution. An all-or-nothing criterion is not to be applied under these circumstances. See *Farrar v. Hobby,* ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); Callier, "When the Winning Party is Not the Prevailing Party," 66 Tul.L.Rev. 2067 (June 1992). It is increasingly recognized that events often do not always fit into neat "Yes or No" categories, and instead may fall on a spectrum between these extremes. See *United States v. Reliable Transfer Co.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975); *TIAA v. Coaxial Communications,* 799 F.Supp. 16 (S.D.N.Y. 1992); Holmes, "Law in Science-Science in Law," 12 Harv.L.Rev. 433 (1899), also in O.W. Holmes, *Collected Legal Papers* 210-43 (1921); Trevaskis, "Measure of Damages for Regulatory Takings," 3 Probate & Property No 2 at 17 (ABA Mar./Apr. 1989).

See also, *Lyte v. Sara Lee Corp.,* 950 F.2d 101, 104 (2d Cir. 1991)

A consent decree, to justify a fee award must meet certain requirements:

> 1. The changes achieved by the decree must be more than "de minimis" or "technical." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 1494, 103 L.Ed.2d 866 (1989) (holding a "prevailing party" under § 1988 need only succeed on "any significant issue" that achieves some of the benefit sought by the lawsuit).
>
> 2. The constitutional claims must be at least "colorable." at the time the decree is entered. In *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 342 (7th Cir. 1987) the court speaks of " . . . a demonstration of at least a probable violation of that law as a condition to the entry of that decree." [In EVANS III the plurality opinion says: "The decree was properly supported when the district court entered the injunction in 1974." (10 F.3d at 480)]
>
> 3. The decree must have a legal basis which authorized the entity to assent to such an agreement. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986)

None of these conditions precedent are lacking in the case at bar or challenged by the City of Chicago. Although *Heldman v. Sobol, supra,* stated that " . . . events often do not always fit into neat "Yes or No" categories, and instead may fall on a spectrum between these extremes", the City of Chicago argues for a rule which requires a consent decree plaintiff to win all future controversies after the decree entry, or be barred from any fees whatever, a sort of 'all or nothing' approach. EVANS IV points out that this approach creates a major problem in fee

awards. If a defendant agrees to settle a civil rights action in a consent decree, at that point the plaintiff has prevailed. The defendant could have eschewed settlement, followed the litigation further, and perhaps ultimately prevailed itself, but did not. After the consent decree settlement, the plaintiff is entitled to attorneys' fees relating, at a minimum, to success in procuring entry of the decree. At that point, plaintiff's counsel is entitled to be paid interim fees, as the EVANS IV court points out. If the rule argued for by the City of Chicago is adopted, the effect on the "private attorneys general" aspect of civil rights litigation would be harsh, even disastrous. Under the City of Chicago theory, could a defendant argue to the trial court for a delay in payment of a plaintiff's attorneys' fees on the basis that some future change in the law, or in the factual circumstances supporting the decree, claimed to be perhaps imminent, may be sufficient to deny payment of interim fees for the work done to obtain the consent decree? Of course, this sounds like a foolish argument, because, if some such impending *deus ex machina* were waiting just offstage, no sensible defendant should have settled in the first place. But you can bet such an argument would be made, and some courts might go for it. The argument to pay no interim fees may fly while a consent decree defendant appeals. Can a person or entity who is party to a consent decree have a change of heart and directly appeal from its entry? The answer is probably: Yes. In *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 550 F.2d 41 (5th Cir. 1977), *cert. dis'd*, 434 U.S. 801, the court held that injunctive provisions in a consent decree were adjudicative and immediately appealable under 28

U.S.C. § 1292(a)(1). In EVANS III, the author of the plurality opinion speaks of the consent decree in terms of the City "knuckling under to the inevitable." (10 F.2d at 476). This is hardly true if the City has a right to change its mind and appeal from entry of the decree. And, as stated, the City could have played out its hand and never settled, maintaining all rights of appeal and taking every appeals course open to it without entering into any settlement whatever. If the appeal were then won by the City on the issues incorporated in the consent decree, no fees would have been forthcoming. But that is not what happened.

The Evans consent decree was prevailing law after Evans I until Evans II was decided. Justice Ripple, concurring in the Evans III plurality, said: (10 F.2d at 483)

> * * * "The plurality opinion writes more broadly than is necessary to decide the case before us. . . . For the present, it is sufficient to conclude that this Court's decision in *Evans v. City of Chicago,* 873 F.2d 1007 (7th Cir. 1989) (*Evans II*), changed the prevailing law to such a degree as to make further enforcement of the consent decree by the District court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail,* ___ U.S. ___, 112 S.Ct. 748, 762-64, 116 L.Ed.2d 867 (1992). * * *

The Supreme Court has observed in *Missouri v. Jenkins,* 491 U.S. 274, 283-284 (1989) what problems can exist for civil rights plaintiffs' counsel with respect to delay in payment of fees; in footnote 6 the court stated:

> * * * . . . the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that

> might offer great benefit to society at large: this result would work to defeat Congress' purpose in enacting Section 1988 of "encourag[ing] the enforcement of federal law through lawsuits filed by private persons.

A settlement embodied in a consent decree is always subject to being vacated under Rule 60(b), as announced in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 757, 116 L.Ed.2d 867 (1992). Vacation of a decree can occur in all of the various alternative ways discussed in *Rufo*. If vacation occurs because the factual conditions the decree sought to affect had been totally rectified, and such a salubrious result occurred before attorney's fees were awarded, would this mean that no fees should be awarded? Where the law charged after the entry of the consent decree but before an award of attorney's fees, does that wipe out any and all possibility of attorney's fees? As in EVANS, where plaintiffs lost the right to argue the due process issue as an underpinning of the consent decree because of failure to cross-appeal in EVANS II, does that eradicate the substantial achievement represented by entry of the decree?

CONCLUSION

For the reasons stated, it is preferable to let EVANS IV stand. There is no driving necessity, as a matter of the Supreme Court's supervision of the lower federal court's interpretation of the five Supreme Court decisions noted here, to change the interpretation currently represented by EVANS IV and other similar decisions which announce the same principles. Procuring a consent decree

settlement ought of itself to allow fees to a plaintiff's attorney for at least that aspect of the work, which is all that is at issue here. The Petition for Certiorari should be denied.

Respectfully submitted,

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